

FILED

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION**

2009 OCT 14 AM 11:31

CITIZEN  
FOR THE  
DISTRICT

HUMBERTO VALLEJO, JR., individually and )  
on behalf of a class, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
PHILLIPS & COHEN ASSOCIATES, LTD, )  
 )  
Defendant. )

2 0 9 C V 3 3 9

**COMPLAINT – CLASS ACTION**

**INTRODUCTION**

1. Plaintiff, Humberto Vallejo, Jr., ("Plaintiff"), individually and on behalf of two classes defined herein, brings this action to secure redress against Defendant Phillips & Cohen Associates, Ltd. ("Phillips & Cohen"). Plaintiff alleges that Phillips & Cohen's conduct violated 15 U.S.C. §§ 1692f, and f(1) of the Fair Debt Collection Practices Act, ("FDCPA").

**JURISDICTION AND VENUE**

2. This Court has jurisdiction under 28 U.S.C. §§1331, 1337 and 15 U.S.C. §1692k (FDCPA).

3. Venue and personal jurisdiction over Phillips & Cohen in this District is proper because:

- a. Plaintiff resides in the District;
- b. Phillips & Cohen transacts business in the District via the use of the mail and phones; and
- c. Phillips & Cohen's collection activities towards Plaintiff and the class occurred within the District.

## **PARTIES**

4. Plaintiff is an individual who resides in Lake County, Indiana.

5. Phillips & Cohen is a New Jersey company with its corporate headquarters located at 1002 Justison Street, Wilmington, Delaware, 19801, and has offices located at 695 Rancocas Rd., Westhampton, New Jersey, 08060; 3025 E. Desert Inn Road, Las Vegas, NV, 89121; 900 S. Pine Island Road, Suite 120, Plantation, Florida, 33324; 815 Ontario Road, Welland Ontario Canada; and Building 5, Floor 9, Exchange Quay, Manchester, M5 3 EF, United Kingdom. Service of process can be made on Phillips & Cohen's registered agent CT Corporation System, 208 S. LaSalle St., Suite 814, Chicago, Illinois, 60604.

6. Phillips & Cohen is engaged in the business of collecting debts owed to others that are in default at the time its services are contracted for by its client creditors.

7. Phillips & Cohen is a debt collector as defined in 15 U.S.C. § 1692a(6).

8. At all times relevant to this Complaint, Phillips & Cohen's acted as a "debt collector" as defined in 15 U.S.C. § 1692a(6) in regard to Plaintiff.

## **FACTS**

9. On or about October 24, 2008, Phillips & Cohen sent Plaintiff a letter in an attempt to collect a debt purportedly incurred for personal, family, or household purposes, and not for business purposes.

10. A copy of the letter Phillips & Cohen sent Plaintiff, with Plaintiff's home address and the "Client Account#" redacted, is attached hereto as Exhibit 1.

11. Exhibit 1 states, "Payment by credit card transaction fees: MasterCard, Visa and Discover \$5 per \$150; American Express \$7 per \$150".

12. Exhibit 1 contains a box in which the consumer can arrange with Phillips and Cohen to pay by credit card by identifying the credit card the consumer is choosing to pay with and to provide account information.

13. Exhibit 1 is a form letter. The name and address to whom letters in the form of Exhibit 1 are addressed to along with the name of the "Client", the "Client Account#", "Our Acct#", and "Balance" change from letter to letter.

14. Letters in the form of Exhibit 1 are identified by Phillips & Cohen as "PCAL593".

15. The collection of a fee that is dependant upon the amount paid by the credit card holder is impermissible as such a fee is not expressly authorized by any credit card agreement.

16. The collection of a fee that is dependant upon the amount paid by the credit card holder is not expressly permitted by Indiana law.

17. The Merchant's Agreement with Visa to which companies that process credit card agreements must abide by expressly states that any fee that is going to be charged to the consumer for using their Visa card, "must be a flat or fixed amount, regardless of the amount of the payment due". Rules for Visa Merchants-Card Acceptance and Chargeback Management Guidelines, p. 10 (2007).

18. No agreement of MasterCard, American Express, or Discover Card permits a merchant to charge back to the card member a scaled fee based upon the amount charged by the card member.

#### **COUNT I - FDCPA § 1692f VIOLATIONS**

19. Plaintiff incorporates paragraphs 1-18 above.

20. 15 U.S.C. § 1692f, Unfair practices, in pertinent part provides:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

15 U.S.C. §§ 1692f, f(1).

21. Phillips & Cohen attempt to collect and collection of a non-fixed credit card fee to which it is not entitled to violated 15 U.S.C. § 1692f(1). *See e.g. Seeger v. AFNI, Inc.*, 548 F.3d 1107 (7th Cir. 2008).

22. Phillips & Cohen attempt to collect and collection of a non-fixed credit fee to which it is not entitled to violated 15 U.S.C. §§ 1692f.

### **CLASS ALLEGATIONS**

23. Plaintiff brings this action on behalf of two classes pursuant to FED. R. CIV. P. 23(a) and 23(b)(3).

24. The Letter Class consists of: (a) all natural persons with an Indiana address (b) where the person was sent a letter in the form of Exhibit 1 (c) stating that "Payment by credit card transaction fees: MasterCard, Visa and Discover \$5 per \$150; American Express \$7 per \$150" (d) during a period beginning one year prior to the filing of this suit and ending 20 days after the filing of this suit.

25. There are more than 40 persons with an Indiana address, where the person was sent a letter in the form of Exhibit 1, stating that "Payment by credit card transaction fees: MasterCard, Visa and Discover \$5 per \$150; American Express \$7 per

\$150", during a period beginning one year prior to the filing of this suit and ending 20 days after the filing of this suit.

26. The Credit Card Payment Class consists of: (a) all natural persons with an Illinois address (b) where the person made a payment by credit card on a debt that Phillips & Cohen was collection upon (c) where that person was charged a fee for the use of the credit card (d) during a period beginning one year prior to the filing of this suit and ending 20 days after the filing of this suit.

27. There are more than 40 persons with an Indiana address, where the person made a payment by credit card on a debt that Phillips & Cohen was collection upon, where that person was charged a fee for the use of the credit card, during a period beginning one year prior to the filing of this suit and ending 20 days after the filing of this suit.

28. Plaintiff has standing to bring the credit card payment class even though he does not have actual damages regarding the conduct complained of. *Keele v. Wexler*, 149 F.3d 589, 593-94 (7th Cir. 1998).

29. There are questions of law and fact common to the members of the class, which common questions predominate over any questions relating to individual class members.

30. The predominant question is whether a non-fixed fee based upon the amount paid by the consumer using a credit card is not permitted thereby violating the FDCPA.

31. Plaintiff's claims are typical of the claims of the class members in that the allegations are all based on the same factual and legal theories.

32. The class is so numerous that joinder of all the members is impractical.

33. Plaintiff will fairly and adequately represent the members of the class.

34. Plaintiff has retained experienced counsel in FDCPA matters and class action litigation.

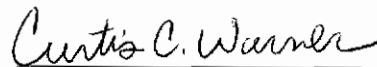
35. A class action is superior for the fair and efficient adjudication of this matter in that:

- a. Phillips & Cohen's course of conduct affects a large group of individuals;
- b. Multiple individual actions are not judicially economical;
- c. Congress contemplated class actions as a means of enforcing the FDCPA; and
- d. The Class members are unaware that their rights have been violated.

**WHEREFORE** Plaintiff requests that Honorable Court enter judgment against Defendant Phillips & Cohen for:

- a. Statutory damages;
- b. Actual damages; and
- c. Attorney's fees, litigation expenses and costs of suit.

Respectfully submitted,



Curtis C. Warner

Curtis C. Warner cwarner@warnerlawllc.com  
Warner Law Firm, LLC  
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Chicago, Illinois 60601  
(312) 238-9820 (TEL)  
(312) 638-9139 (FAX)

# **EXHIBIT 1**





P.O. Box 48458  
Oak Park, MI 48237  
Return Service Requested

10/24/08

Humberto J Vallejo Jr



**Phillips & Cohen Associates, Ltd.**

Ph (866) 226-0074 • Fx 954-472-8411  
Office Hours: M-Th: 8am-9pm, Fri: 8am-6pm  
Sat: 8am-12pm

CHECK CARD USING FOR PAYMENT	
<input type="checkbox"/> VISA	<input type="checkbox"/> PAYMENT AMOUNT
CARD NUMBER	
CARD BILLING ADDRESS AND ZIP CODE	
SIGNATURE	EXP. DATE

Check the box below if you are paying by credit card

☐  
1002 Justison Street  
Wilmington, DE 19801

Account #: 7852172  
Balance: \$4413.61

\*\*\* PLEASE DETACH AND RETURN IN THE ENCLOSED ENVELOPE WITH YOUR PAYMENT \*\*\*

Re: Client: **HSBC Bank**  
Client Acct#:   
Our Acct#: **7852172**  
Balance: **\$4413.61**

Dear Humberto J Vallejo Jr:

We had hoped that you would resolve your financial obligation with HSBC Bank prior to initiating further collection activity to recover the amount owed to them. Apparently that is not the case.

In an effort to reach a mutually acceptable remedy to this matter, our client has agreed to offer you the opportunity to settle this indebtedness for 65% of the amount owed or \$2868.85. If this matter remains unresolved, we will have no other alternative but to evaluate your credit history and present financial circumstances, then proceed accordingly.

You now have an extremely important decision to make. The wrong choice could ultimately be more costly to you in the future, as this offer to settle at a reduced rate may not be available.

If you are unable to pay in full or settle at the reduced rate, contact our office today. You may qualify for our hardship program. However, please be advised that your failure to respond will leave us with no option but to use the resources of this agency to explore all means of recovering the total amount due to our client.

We genuinely hope that you resolve this obligation without the need for further collection activity. Should you have any questions regarding this matter please call at the above referenced number.

Payment by credit card transaction fees: MasterCard, Visa and Discover \$5 per \$150; American Express \$7 per \$150

Sincerely,

Phillips & Cohen Associates, Ltd.

**\*\* IMPORTANT CONSUMER INFORMATION \*\***

This communication is from a debt collector. This is an attempt to collect a debt and any information obtained will be used for that purpose.